

APPENDIX A

The Honorable James L. Robart

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

STATE OF WASHINGTON,

Plaintiff,

v.

UNITED STATES DEPARTMENT OF
HEALTH AND HUMAN SERVICES; ALEX
M. AZAR, in his official capacity as the
Secretary of the United States Department
of Health and Human Services;

Defendants.

NO. 2:20-cv-01105-JLR

BRIEF OF AMICI NORTHWEST
HEALTH LAW ADVOCATES ET AL.,
IN SUPPORT OF PLAINTIFF'S
MOTION FOR PRELIMINARY
INJUNCTION

Noted for: August 7, 2020

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I. INTRODUCTION AND STATEMENT OF INTEREST

Under the 2020 Final Rule regarding Section 1557 of the Patient Protection and Affordable Care Act (“ACA”), the U.S. Department of Health and Human Services (“HHS”) proposes to dramatically limit anti-discrimination protections now generally applied to all health insurers. The new Final Rule, if permitted to stand, will strip anti-discrimination protections from millions of people enrolled in employer-sponsored health plans. The new Final Rule must be enjoined because it is inconsistent with (1) the plain language of the statute it purports to interpret, (2) long-standing interpretations from regulators across the country, and (3) decisions from courts, including a recent decision from the Ninth Circuit.

For nearly a decade, Section 1557, the anti-discrimination provision of the ACA, has been uniformly understood and interpreted to apply to all health plans issued and administered by a covered insurer. An insurer is “covered” by Section 1557 if it receives any federal assistance. If it does, then none of its health plans are permitted to discriminate – a principle that is consistent with long-standing anti-discrimination laws in other contexts. The new Final Rule, however, purports to roll back protections for most health plans leaving *only* health plans sold through the ACA Marketplaces, and Medicaid/Medicare managed care plans subject to federal anti-discrimination law. All other health plans offered by an insurer would be permitted to discriminate with impunity. The loss of federal anti-discrimination protection will invariably lead to a loss of access to medically needed care for people with disabilities, transgender enrollees and others. This cannot be squared with Congress’ intent in enacting Section 1557.

A recent Ninth Circuit decision, *Schmitt v. Kaiser Found. Health Plan of Wash.*, demonstrates the intended breadth of ACA’s Section 1557, and the fact that it applies to employer-sponsored health plans – the exact type of health coverage that would be

1 *excluded* by the proposed 2020 Final Rule. *Id.*, 2020 U.S. App. LEXIS 21902, at *8 (9th Cir.
 2 July 14, 2020). In that case, two plaintiffs with disabling hearing loss who are enrolled
 3 in Kaiser health insurance through their employment challenged Kaiser’s exclusion of
 4 all treatment for hearing loss (except for cochlear implants) as a form of disability
 5 discrimination. *Id.* at *8–*9. The Ninth Circuit concluded that the ACA imposes “an
 6 affirmative obligation not to discriminate in the provision of health care – *in particular*
 7 *to consider the needs of disabled people and not design plan benefits in ways that*
 8 *discriminate against them.*” *Id.* at *18–*19 (emphasis added). It found that a blanket
 9 exclusion of all treatment for a disabling health condition in a health insurance plan
 10 “raises an inference of discrimination.”¹ *See id.* at *26.

11 The 2020 Final Rule would undo the anti-discrimination rights that the Ninth
 12 Circuit recognized. If health insurers are not generally subject to the ACA’s anti-
 13 discrimination law, those Americans who were historically shut out of health insurance
 14 coverage – including persons with disabilities and serious health conditions, LGBTQ+
 15 individuals, pregnant women, the elderly, and individuals with limited English
 16 proficiency, among others – may be subject once again to unfair discrimination in the
 17 design of health plan benefits. The 2020 Final Rule, including the proposed limitation
 18 on the definition of “covered entities” under Section 1557, should be enjoined as beyond
 19 HHS’s authority and arbitrary and capricious.

20 Proposed Amici, Northwest Health Law Advocates (“NoHLA”) and two
 21 Washington residents, C.P. and M.D., have a strong interest in ensuring that Washington
 22 residents received the full benefits of the ACA’s health care reforms including its non-
 23 discrimination protections:

24
 25 ¹ The case was remanded to the trial court so that the plaintiffs could amend their complaint to better
 26 demonstrate that the exclusion of non-cochlear hearing loss treatment is a “proxy” for excluding
 individuals with disabling hearing loss. *Id.*, at *29–*31.

1 *NoHLA* is a nonprofit legal organization focused on promoting access to
 2 comprehensive, affordable health care for Washington state residents, with special
 3 attention to the needs of low-income and vulnerable populations. Varon Decl., ¶2.
 4 NoHLA submitted comments regarding both the 2016 and 2020 HHS rulemaking
 5 procedures, supported legislation in Washington state to enact a “mini-Section 1557” to
 6 protect the anti-discrimination rights of Washington residents in Washington insured
 7 plans, and was granted permission to submit an amicus brief in *Schmitt v. Kaiser*, Case
 8 No. 18-35892. *Id.*, ¶¶3-5.

9 *C.P., by and through his parents, P.P. and N.P.*, is a 15-year-old boy who lives in
 10 Bremerton Washington who is diagnosed with gender dysphoria. P.P. Decl., ¶1. C.P.
 11 has sought coverage for medically necessary treatment for his gender dysphoria from
 12 his self-funded health benefit plan through his parent’s employment with Catholic
 13 Health Initiatives Franciscan Health System (“CHI”), now known as CommonSpirit
 14 Health. *Id.*, ¶¶1-3. C.P. has been denied coverage of treatment and services available
 15 under his health plan solely because CHI and its third-party administrator (“TPA”), Blue
 16 Cross Blue Shield of Illinois (“BCBSIL”), have determined that the services are a form of
 17 “gender reassignment surgery.” *Id.* At the same time, CHI and BCBSIL cover the
 18 services when provided to cisgender enrollees. *Id.* If the 2020 Final Rule is implemented
 19 such that Section 1557 does not apply to C.P.’s health coverage, CHI and BCBSIL will
 20 continue to exclude the gender affirming treatment he seeks in the future and to
 21 discriminate against him on the basis of his gender.

22 *M.D., by and through her parents, C.D., and A.D.*, is a 22-month-old toddler who
 23 lives with her parents in Spokane, Washington. C.D. Decl., ¶1. She is severely disabled
 24 and requires life-sustaining treatment with a tracheostomy and ventilator. *Id.* To treat
 25 her condition and enable her to live at home with her parents instead of an institution
 26

1 like a hospital or skilled nursing facility, M.D. requires in-home skilled nursing care. *Id.*,
 2 ¶¶3-6. M.D. receives coverage through a self-funded health benefit plan that is claims
 3 administered by Aetna Life Insurance Company, Inc., through her father's employment
 4 with Salesforce.com. *Id.*, ¶2. Aetna, on behalf of Salesforce.com, offers only a very
 5 limited benefit for in-home skilled nursing care that will run out in a few months. *Id.*,
 6 ¶¶4-5. If Section 1557 does not apply to M.D.'s coverage, Aetna will be permitted to
 7 limit the life-sustaining skilled nursing benefit that M.D. needs. When the limited in-
 8 home nursing care benefit in the Aetna plan is exhausted, M.D.'s parents may be forced
 9 to institutionalize her so that she can continue to receive her life-saving treatment. *Id.*,
 10 ¶¶6-7. Benefit designs that result in the unnecessary institutionalization of disabled
 11 individuals is a form of disability discrimination that will no longer be prohibited for
 12 M.D. and others. *See Olmstead v. L.C.*, 527 U.S. 581, 119 S. Ct. 2176 (1999).

13 All three proposed Amici have a strong interest in ensuring that HHS's 2020 Final
 14 Rule is enjoined from taking effect. Without swift injunctive action, the ACA's anti-
 15 discrimination law will be eviscerated by the new HHS Rule. The term "health program
 16 or activity" under the ACA's Section 1557 should include health insurers and employer-
 17 sponsored health benefit plans when any part of the insurer receives federal financial
 18 assistance.

19 II. ARGUMENT

20 A. Before the ACA, Health Insurers and Third-Party Administrators for Self- 21 Funded Plans Could Discriminate with Impunity.

22 The ACA marked a revolutionary change in how health coverage is designed and
 23 administered. Before the ACA, insurance companies could freely discriminate against
 24 disabled enrollees, women, and others, at least in the design of health benefits. *Schmitt*,
 25 2020 U.S. App. LEXIS 21902, at *3 ("Prior to the ACA's enactment, an insurer could
 26 generally design plans to offer or exclude benefits as it saw fit without violating federal

antidiscrimination law.”); *see e.g., Weyer v. Twentieth Century Fox Film Corp.*, 198 F.3d 1104, 1115-1117 (9th Cir. 2000) (The Americans with Disabilities Act (“ADA”) does not prohibit discriminatory benefit design on the basis of disability by insurers); *Micek v. City of Chi.*, 1999 U.S. Dist. LEXIS 16263, at *22 (N.D. Ill. Sep. 30, 1999) (The ADA does not regulate the discriminatory content of an employee’s health benefit package); *Standridge v. Union Pac. R.R. Co. (In re Union Pac. R.R. Emp’t Practices Litig.)*, 479 F.3d 936, 943 (8th Cir. 2007) (health plan’s denial of coverage for contraception is non-discriminatory, despite the fact that only women can become pregnant if contraception is denied).

In fact, under Section 504 of the Rehabilitation Act, the definition of “federal financial assistance” specifically *excluded* contracts of insurance. *See* 45 C.F.R. §84.3(h) (“Federal financial assistance means any grant, loan, contract (*other than ... a contract of insurance*)” (emphasis added). Nor were “contracts of insurance” generally subject to the Title I of the ADA. *See* 42 U.S.C. §12111(2). The ADA included a “safe harbor” that permitted the use of disability discrimination in the design of benefits, as part of “medical underwriting.” *See* 42 U.S.C. §12201(c). The Ninth Circuit’s decision to exempt benefit design discrimination in *Weyer* was based on Congress’s failure to specifically include “contracts of insurance” when crafting anti-discrimination law, such as the ADA: “[H]ad Congress intended to control which coverages had to be offered by employers [and insurers] it would have spoken more plainly because of the well-established marketing process to the contrary.” *Id.*, 198 F.3d at 1116.

With the ACA, Congress has now spoken more plainly. The ACA explicitly prohibits discrimination in “health programs or activities” any part of which, receive federal financial assistance:

[A]n individual shall not, on the ground prohibited under title VI of the Civil Rights Act of 1964 (42 U.S.C. 2000d et seq.), title IX of the Education Amendments of 1972 (20 U.S.C. 1681 et

seq.), the Age Discrimination Act of 1975 (42 U.S.C. 6101 et seq.), or section 504 of the Rehabilitation Act of 1973 (29 U.S.C. 794), be excluded from participation in, be denied the benefits of, or be subjected to discrimination *under, any health program or activity, any part of which is receiving Federal financial assistance, including credits, subsidies, or contracts of insurance*, or under any program or activity that is administered by an Executive Agency or any entity established under this title (or amendments).

42 U.S.C. §18116(a). Under the plain language of the statute, health insurance contracts that receive federal financial assistance are included within the term “health program or activity.” *Id.* Thus, health insurers that receive federal financial assistance are subject to the ACA’s anti-discrimination protections. *Id.*

Despite the plain language of the statute, the 2020 HHS Final Rule impermissibly *reads out* “contracts of insurance” from the ACA in order to limit the scope of Section 1557. The new rule declares that health insurance companies are not principally engaged in providing healthcare in order to generally excuse them from the anti-discrimination obligations of the statute. *See* proposed 45 C.F.R. §92.3(b), (c) , 85 Fed. Reg. 37,244–45. The proposed rule is contrary to the plain language of the statute and what Congress intended. Indeed, until HHS proposed its 2020 Final Rule, every court and state regulator to consider this issue has held that health insurers are generally “covered entities” under Section 1557. To conclude otherwise would undermine the ACA in its entirety.

B. Congress Intended Anti-Discrimination Protections to Apply to Employer-Sponsored Health Coverage.

This Court must consider the ACA as a whole when interpreting Section 1557. “A fair reading of legislation demands a fair understanding of the legislative plan.” *King v. Burwell*, __ U.S. __, 135 S. Ct. 2480, 2496 (2015); *see also id.*, at 2493, *quoting New York State Dept. of Social Servs. v. Dublino*, 413 U. S. 405, 419-420, 93 S. Ct. 2507 (1973) (“We cannot interpret federal statutes to negate their own stated purposes”). This is true even though

1 the ACA contains “examples of inartful drafting.” *Id.*, at 2492. A court must construe
 2 the ACA’s statutory language within its context and “with a view to [the passage’s] place
 3 in the overall statutory scheme.” *Id.* Moreover, Congressional intent must be
 4 determined in light of the remedial nature of the ACA. Comprehensive remedial
 5 statutes like the ACA are generally accorded “a sweep as broad as their language.”
 6 *Griffin v. Breckenridge*, 403 U.S. 88, 97, 91 S. Ct. 1790 (1971).

7 “In the Affordable Care Act, Congress addressed the problem of those who
 8 cannot obtain insurance coverage because of pre-existing conditions or other health
 9 issues.” *Nat’l Fed’n of Indep. Bus. v. Sebelius*, 567 U.S. 519, 547, 132 S. Ct. 2566 (2012). The
 10 ACA was intended to provide comprehensive health care reform to ensure that every
 11 American, including persons with disabilities, LGBTQ+ individuals, women, persons
 12 with limited English proficiency, etc., would have access to quality, affordable health
 13 care and health coverage. *See* 111 CONG. REC. Vol. 156, No. 45, E462 (March 23, 2010))
 14 (attached as Hamburger Decl., *Exh. A*). This goal extended to ending discrimination
 15 within the benefit design of health plans subject to the ACA. As Congressman Bill
 16 Pascrell, Jr. noted, the ACA’s reforms were particularly directed at ending
 17 discrimination in the provision of health insurance coverage:

18 [The ACA will e]nsure that *essential benefits not be subject to*
 19 *denial on the basis of the individual's present or predicted*
 20 *disability*, degree of medical dependency or quality of life.
 21 Taken together, these [ACA requirements] are strong
 22 protections that will help ensure that the essential health
 23 benefits package ... will take into account the needs of people
 24 with brain injury and other disabilities and chronic conditions
 25 and not impose value judgments about disability and quality
 26 of life. This legislative language makes clear that *Congress*
understands the subtle discrimination that can occur against
people with brain injury and other disabilities in the area of
benefit design.

1 *Id.* (emphasis added); *see also*, 81 Fed. Reg. 31,379 (“[A] fundamental purpose of the ACA
 2 is to ensure that health services are available broadly on a nondiscriminatory basis to
 3 individuals throughout the country”); 81 Fed. Reg. 31,386 (A central purpose of the ACA
 4 is “ensuring that entities principally engaged in health services, *health insurance*
 5 *coverage* or other health coverage do not discriminate in any of their programs or
 6 activities, thereby enhancing access to services and coverage”) (emphasis added).
 7 Congress’ expansion of anti-discrimination law to apply to health insurance contracts
 8 was deliberate and groundbreaking.

9 Congress intended a sweeping legislative reform with the ACA. The law
 10 prohibits insurers from discrimination based upon health conditions in enrollment and
 11 re-enrollment. *See* 42 U.S.C. §§300gg-1; §300gg-2; §300gg-4. It ends the use of
 12 discriminatory pre-existing condition limitations in ACA-regulated health insurance. 42
 13 U.S.C. §300gg-3. It prohibits insurers from using disability, health status and medical
 14 conditions as a basis of denying eligibility for coverage. 42 U.S.C. §300gg-4(a). It restricts
 15 insurers from discriminating against people with health conditions when it comes to
 16 paying for premiums. *See* 42 U.S.C. §300gg.

17 Congress not only intended to make it easier for all Americans (including people
 18 with disabilities and serious health conditions) to purchase health coverage, it also
 19 intended to end discrimination in the type of benefits offered. Without this protection,
 20 insurers could simply re-write illegal pre-existing condition limitations as benefit
 21 exclusions. Congress mandated that ACA-regulated health plans must offer
 22 comprehensive health benefits in ten broad categories of coverage, known as Essential
 23 Health Benefits, or EHBs. 42 U.S.C. §18022(b)(1). But offering coverage within each of
 24 the ten EHBs, standing alone, is not enough to comply with the ACA. *Insurers must also*
 25 *deliver EHBs in a non-discriminatory manner.* *See* 42 U.S.C. §§300gg-6; 18022(b)(4)(B) ;
 26

1 45 C.F.R. §§156.110(d); 156.125(a) (Insurers do “not provide EHB if its benefit design, or
 2 the implementation of its benefit design, discriminates...”); *Schmitt*, 2020 U.S. App.
 3 LEXIS 21902, at *18-19.

4 In addition to the specific non-discrimination requirement for EHBs, Congress
 5 included a *general* prohibition of discrimination in any health program or activity with
 6 Section 1557. *See* 42 U.S.C. §18116(a). When read within the context of the ACA, it is
 7 clear that Congress intended Section 1557 to apply broadly to any health program or
 8 activity that receives federal financial assistance in any part of its operations, including
 9 “contracts of insurance.” *Id.*; *see Chevron U.S.A., Inc. v. Nat. Res. Def. Council, Inc.*, 467
 10 U.S. 837, 842, 104 S. Ct. 2778 (1984) (“If the intent of Congress is clear, that is the end of
 11 the matter.”).

12 **C. The ACA Broadly Ensures Comprehensive Coverage Without**
 13 **Discrimination on the Basis of Race, Gender, Age or Disability.**

14 As noted above, the Ninth Circuit recently affirmed Section 1557’s role in
 15 protecting health insurance enrollees from illegal discrimination in *Schmitt v. Kaiser*
 16 *Found. Health Plan of Wash.* “Section 1557 incorporates by reference the grounds
 17 protected by four earlier nondiscrimination statutes and prohibits discrimination on
 18 those grounds in the health care system—as relevant here, *in health insurance*
 19 *contracts.*” *Id.*, 2020 U.S. App. LEXIS 21902, at *10 (emphasis added). While Section
 20 1557 broadly addresses four kinds of discrimination, it is narrowly focused on the health
 21 care system – including “contracts of insurance.” *See id.*, at *12. Specifically, the Ninth
 22 Circuit found that a health insurer may engage in intentional discriminatory conduct
 23 when it designs health insurance benefits in a discriminatory manner. *Id.*, at *17.

24 The *Schmitt* plaintiffs were (and remain) enrolled in employer-sponsored health
 25 insurance. *Id.*, at *8; Hamburger Decl., ¶2. They are not enrolled in health insurance
 26 either through an ACA marketplace plan or Medicaid/Medicare. *See* 85 Fed. Reg.

37,244-45, *citing to* 45 C.F.R. §92.3. If the proposed 2020 Final Rule is allowed to take effect, the *Schmitt* plaintiffs' current health coverage could be excluded from federal anti-discrimination protections, despite the Ninth Circuit's recent ruling to the contrary.²

Likewise, proposed amici C.P. and M.D., are enrolled in self-funded employer-sponsored plans that are administered by Aetna and BCBSIL, both health insurers acting as TPAs. Presently, courts have held that TPAs may be subject to Section 1557's anti-discrimination protections. *See, e.g., Boyden v. Conlin*, 341 F. Supp. 3d 979, 997-98 (W.D. Wis. 2018) (third-party administrator is a proper defendant in a Section 1557 claim since it recommends the design of benefits as well as administering the plan); *Tovar v. Essentia Health*, 342 F. Supp. 3d 947, 954 (D. Minn. 2018) (same). If the 2020 Final Rule takes effect, Amici C.P. and M.D. will lose the Section 1557 protections that they now enjoy.³ *See* 85 Fed. Reg. 37,173-174 ("To the extent that employer-sponsored group health plans do not receive Federal financial assistance and are not principally engaged in the business of providing healthcare (as set forth in the rule) they would not be covered entities.").⁴

Federal regulators also improperly limit the scope of anti-discrimination law in the 2020 Final Rule to only those activities for which a covered entity that is not principally engaged in the business of providing healthcare (*i.e.*, a health insurer) receives federal financial assistance. *See proposed* 45 C.F.R. §92.3(b), 85 Fed. Reg. 37,244

²The Washington legislature has enacted state anti-discrimination law to protect the *Schmitt* plaintiffs and others enrolled in *insured* health plans. *See* SHB 2338 (effective June 11, 2020) (amending anti-discrimination requirements in RCW 48.43.0128 to apply to virtually all Washington health plans issued by health carriers, like Kaiser); *See* Dkt. No. 10, Kreidler Decl., ¶11.

³ Under the 2020 Final Rule, amici C.P. may also be unable to enforce Section 1557's anti-discrimination law against CHI, a "health program or activity" under the 2020 Final Rule which now may claim a religious exemption. 85 Fed. Reg. 37,245. There is, however, no religious exemption included within Section 1557. *See* Dkt. No. 4, pp. 12-13.

⁴ Unlike the *Schmitt* plaintiffs, Amici C.P. and M.D. are not otherwise protected by state anti-discrimination law. *See* Dkt. No. 10, Kreidler Decl., ¶¶13-14.

1 (“the requirements applicable to a ‘health program or activity’ under this part shall apply
2 to such entity’s operations only to the extent any such operation receives federal financial
3 assistance.”). In other words, under the new rule, health insurers would be subject to
4 anti-discrimination law *only* when delivering health plans in the ACA marketplace or
5 for Medicaid or Medicare. In all other activities (such as delivering employer-sponsored
6 insurance or acting as TPAs), health insurers would be free to discriminate, despite their
7 receipt of federal assistance.

8 For example, under the 2020 Final Rule, an insurance company could be required
9 to cover medications to treat HIV/AIDS for disabled enrollees through the ACA
10 marketplaces in order to comply with Section 1557, but the same insurer could avoid the
11 identical coverage in its private health coverage.⁵ Insurers could exclude all coverage
12 for developmental disabilities in private health insurance, while, at the same time, such
13 an exclusion would be illegal in a Medicaid managed care plan or on the ACA
14 marketplace. Allowing health care discrimination to remain in employer-sponsored
15 health coverage was not what Congress intended. The ACA’s purpose was to eliminate
16 all such discrimination.

17 The Final Rule ignores long-standing interpretations of civil rights statutes that
18 receipt of any federal financial assistance renders the entire entity subject to anti-
19 discrimination law. *See United States v. Baylor Univ. Med. Ctr.*, 736 F.2d 1039, 1042 (5th
20 Cir. 1984) (Receipt of Medicaid or Medicare funds in any part of an entity’s program
21 brought the entire program into the scope of Section 504 of the Rehabilitation Act; anti-
22 discrimination protections were not limited to only those direct beneficiaries of the
23 Medicaid or Medicare funds); *Schroeder v. Chicago*, 927 F.2d 957, 962 (7th Cir. 1991)
24 (“[T]he various civil rights statutes including the Rehabilitation Act [] apply to the

25 ⁵ Other laws (such as state insurance laws) may still mandate such coverage.
26

entirety of any state or local institution that had a program or activity funded by the federal government.”); *Mansourian v. Bd. of Regents of the Univ. of Cal.*, 816 F. Supp. 2d 869, 917 (E.D. Cal. 2011) (“[I]f any arm of an education institution received federal funds, the institution as a whole must comply with Title IX’s provisions.”); *Rumble v. Fairview Health Servs.*, 2015 U.S. Dist. LEXIS 31591, at *34 (D. Minn. Mar. 16, 2015) (“[A]s long as part of an organization or entity receives federal funding or subsidies of some sort, the entire organization is subject to the anti-discrimination requirements of Section 1557.”). HHS cannot unilaterally limit the scope of anti-discrimination law to just those parts of “covered entities” that receive federal financial assistance.

D. No Court or State Regulator Has Adopted HHS’s Constrained Interpretation of “Covered Entity.”

Many state insurance commissioners have concluded that Section 1557 applies to all health insurers in all activities.⁶ In April 2018, Idaho’s insurance director issued a directive that all health benefit plans, “including the individual, small group, and large group insured markets and self-funded health benefit plans” may not discriminate on the basis of disability “such as autism” by “adopting or implementing discriminatory benefit designs.” See Bulletin No. 18-02, State of Idaho, Department of Insurance (“[A]n exclusion of treatments for autism spectrum disorder [is] discriminatory and prohibited.”).⁷ The insurance regulators of Washington, Rhode Island, Pennsylvania, Minnesota, and Massachusetts, among others, have all concluded that blanket exclusions of all coverage for gender affirming treatment in health insurance plans are

⁶ Proposed Amici respectfully request that the Court take judicial notice of the public documents from state regulators cited below. See Fed. R. Evid. 201(b); *Arizona Libertarian Party v. Reagan*, 798 F.3d 723, 727, n. 3 (9th Cir. 2015) (“We may take judicial notice of ‘official information posted on a governmental website, the accuracy of which [is] undisputed.’”).

⁷ See <https://doi.idaho.gov/DisplayPDF?Id=4924> (last visited 7/26/20).

1 discriminatory in violation of Section 1557.⁸ Counsel for proposed Amici are unaware of
 2 any state regulatory guidance similar to that in the 2020 Final Rule. Hamburger Decl.,
 3 ¶4.

4 The courts that have considered this issue have similarly concluded that
 5 Section 1557 applies more broadly than just the ACA marketplace plans and
 6 Medicaid/Medicare. *See Schmitt*, 2020 U.S. App. LEXIS 21902, at *10 (private employer-
 7 sponsored health plans are subject to Section 1557); *Callum v. CVS Health Corp.*, 137 F.
 8 Supp. 3d 817, 849 (D.S.C. 2015) (consistent with the proposed 2016 rules, a retail
 9 pharmacy, was a “health program or activity”); *Rumble v. Fairview Health Servs.*, 2015 U.S.
 10 Dist. LEXIS 31591, at *36 (D. Minn. Mar. 16, 2015) (Emergency Physicians group was
 11 subject to Section 1557); *Esparza v. Univ. Med. Ctr. Mgmt. Corp.*, 2017 U.S. Dist. LEXIS
 12 142944, at *20 (E.D. La. Sep. 5, 2017) (Section 1557 is not limited to only federal financial
 13 assistance provided to entities in the health insurance exchange); *Tovar v. Essentia Health*,
 14 342 F. Supp. 3d 947, 954 (D. Minn. 2018) (TPA of a self-funded employer-sponsored plan
 15 may be subject to Section 1557: “Nothing in Section 1557, explicitly or implicitly,
 16 suggests that TPAs are exempt from the statute's nondiscrimination requirements.”);
 17 *Kadel v. Folwell*, 2020 U.S. Dist. LEXIS 42586, at *26 (M.D.N.C. Mar. 10, 2020) (State
 18 employee self-funded plan may be subject to Section 1557 due to exclusion of all
 19 coverage for gender affirming treatment).

20 The narrow interpretation of “health program or activity” in the 2020 Final Rule
 21 makes no sense from a policy perspective. When passing the ACA, Congress was

22
 23 ⁸See [https://www.insurance.wa.gov/sites/default/files/documents/gender-identity-](https://www.insurance.wa.gov/sites/default/files/documents/gender-identity-discrimination-letter.pdf)
 24 [discrimination-letter.pdf](https://www.insurance.wa.gov/sites/default/files/documents/gender-identity-discrimination-letter.pdf) (broad exclusions of coverage on the basis of gender identity by health insurance
 25 carriers are prohibited); [http://www.ohic.ri.gov/documents/Bulletin-2015-3-Guidance-Regarding-](http://www.ohic.ri.gov/documents/Bulletin-2015-3-Guidance-Regarding-Prohibited-Discrimination.pdf)
 26 [Prohibited-Discrimination.pdf](http://www.ohic.ri.gov/documents/Bulletin-2015-3-Guidance-Regarding-Prohibited-Discrimination.pdf); <https://www.pabulletin.com/secure/data/vol46/46-18/762.html>;
<http://mn.gov/commerce-stat/pdfs/bulletin-insurance-2015-5.pdf>;
<https://www.mass.gov/files/documents/2016/07/uj/bulletin-201403.pdf> (last visited 7/26/20).

1 uniquely focused on reforming the activities of *health insurers* in order to promote
 2 comprehensive coverage. *See Nat'l Fed'n of Indep. Bus.*, 567 U.S. at 547. Other areas of
 3 “health activity” such as hospitals and medical providers, were already subject to federal
 4 anti-discrimination law through Section 504 of the Rehabilitation Act. *See* 45 C.F.R.
 5 §84.3(h); *see e.g., Hurley v. Loma Linda Univ. Med. Ctr.*, 2014 U.S. Dist. LEXIS 18018, at *29
 6 (C.D. Cal. Feb. 12, 2014). The main purpose of Section 1557 was to make “contracts of
 7 insurance” subject to federal anti-discrimination protections for the very first time.
 8 HHS’s new Final Rule which proposes to exclude health insurers from federal anti-
 9 discrimination law, except those that participate on the ACA marketplaces and in
 10 Medicaid and Medicare, exceeds its authority, is arbitrary and capricious and should be
 11 enjoined.

12 **E. There Is No “Good Reason” for HHS’s Proposed Limitation on the Definition**
 13 **of “Health Program or Activity.”**

14 When changing a rule that has “engendered serious reliance interests” an agency
 15 must provide a detailed justification for the new rule. *FCC v. Fox TV Stations, Inc.*, 556
 16 U.S. 502, 515, 129 S. Ct. 1800 (2009) (“It would be arbitrary or capricious to ignore such
 17 [reliance]”). Since the ACA passed in 2010, state regulators and courts have concluded,
 18 *without exception*, that Section 1557 regulates “health programs or activities” including
 19 health insurers. HHS offers no “reasoned analysis” for why this long-established
 20 determination must be overturned. HHS merely states that its constrained reading of
 21 “health program or activity” is “at least as reasonable as the 2016 Rule[].” 85 Fed. Reg.
 22 37,163. HHS’s justification for narrowing the application of “health program or activity”
 23 is, as a matter of law, insufficient. *See Encino Motorcars, LLC v. Navarro*, 136 S. Ct. 2117,
 24 2127 (2016). “This lack of reasoned explication for a regulation that is inconsistent with
 25 the Department’s longstanding earlier position results in a rule that cannot carry the
 26 force of law.” *Id.* For ten years, health insurers have been subject to the requirements of

1 Section 1557's anti-discrimination law. HHS offers no "good reason" for changing the
2 scope now.

3 **III. CONCLUSION**

4 This Court should enjoin the HHS proposed Final Rule as sought by the
5 Washington Attorney General's Office.

6 DATED: July 29, 2020.

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